PEMBINAAN SIMA SDN BHD

v.

LOW LAI SENG HOLDINGS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[SUIT NO: S2-22-392-1991]
26 AUGUST 1997

CONTRACT: *Damages - Liquidated damages - Whether damages must be proved in the light of s. 75 of the Contracts Act 1950 - Whether there is any difference between liquidated damages and penalties - Contracts Act 1950, s. 75*

By virtue of a sale and purchase agreement, the defendant sold to the plaintiff land which was subject to a leasehold tenure of 40 years. The defendant however agreed to secure a further 20 years on the lease at its own costs and expenses. The defendant also agreed that if it failed to secure the extension of the lease within two years from the date of the sale and purchase agreement, the defendant would pay the plaintiff a total of RM118,800 as agreed damages.

The defendant failed to fulfill its obligation and plaintiff took out an action claiming RM118,800 as damages together with interest and costs. The defendant argued that the plaintiff ought to prove the damages as its case fell within s. 75 of the Contracts Act 1950 ('the CA').

Held:

[1] Section 75 of the CA provides that in every case the court must determine what reasonable compensation is, 'whether or not actual damage or loss is proved to have been caused thereby'. There is therefore no distinction between liquidated damages and penalties as understood in English Law. A plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or reasonable compensation.

[2] In this case, the loss the plaintiff suffered could easily be proved by either calling the real estate valuer to assess the value of the 40-year lease and a 60-year lease and to ask for the difference. In this case, this was not done and the plaintiff had therefore failed to prove its case in the normal way.

[Action dismissed; costs awarded on High Court scale.]

Cases referred to:
Bonham-Carter v. Hyde Park Hotel Ltd (1948) 64 TLR 177 ***(foll)***
Hadley v. Baxendale [1954] 9 Ex Ch 341 ***(foll)***
Realvest Properties Sdn Bhd v. Co-operative Central Bank Ltd [1996] 3 CLJ 823 ***(foll)***
Reliance Shipping & Travel Agencies v. Low Ban Siong [1996] 2 CLJ 960 ***(foll)***
Selva Kumar Murugiah v. Thiagarajah a/l Retnasamy [1995] 2 CLJ 375 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 75

For the plaintiff - KW Lai (CY Chong & M Selvamoney with him); M/s Lai & Assocs
For the defendant - Joseph Yeo (AS Gill with him); M/s AJ Ariffin, Yeo & Harpal

JUDGMENT

RK Nathan JC:

Facts

The defendant sold to the plaintiff two industrial lots at a price of RM297,000 each. A sale and purchase agreement was entered into on 16 May 1986. The defendant gave the plaintiff a discount of 20% on the purchase price. The said lots had a leasehold tenure of 40 years only. By a letter dated 19 April 1986 the defendant agreed at its own costs and expense to secure a further 20 years on the lease. The defendant also agreed that if it failed to secure the said extension of the lease within two years from the date of the sale and purchase agreement the defendant would pay the plaintiff RM59,400 as agreed damages for each lot amounting to RM118,800. Two years went by and the defendant failed to secure the extension of the lease. The plaintiff granted a further extension of one year. Yet again the defendant was unable to deliver. The plaintiff then issued a notice of demand and since there was no response, issued out this writ claiming the sum of RM118,800 as damages, interest and costs.

At the close of the case for the plaintiff which established the above-related facts, the defendant elected to submit that there was no case to answer. This Court having put the defendant on notice in respect of its election, the defendant submitted that it was specifically pleaded by the defendant that the plaintiff ought to prove the damages.

The defendant submitted that the clause relating to the payment of damages of RM118,800 relied on by the plaintiff clearly fell within the ambit of s. 75 of the Contracts Act 1950 (the Act).

Court's Findings

Section 75 of the Act reads:

> 75. Compensation for breach of contract where penalty stipulated for.
>
> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Section 75 of the Act was given judicial interpretation by the Federal Court. In *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 FC the Court held that in Malaysia, there is no distinction between liquidated damages and penalties as understood under English law, in view of s. 75 of the Act which provides that in every case the Court must determine what is the reasonable compensation, "whether or not actual damage or loss is proved to have been caused thereby". The Federal Court further held that the said words in question must be given a restricted construction. Hence, despite the words in question, a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in *Hadley v. Baxendale* [1954] 9 ExCh 341; [1843-60] All ER Rep 461. It went on to state the law that any failure to prove such damages will result in the refusal of the Court to award such damages. In the same case Peh Swee Chin FCJ held that the plaintiff "will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual way".

Recently the Court of Appeal followed the decision in *Selva Kumar* in *Reliance Shipping & Travel Agencies v. Low Ban Siong* [1996] 2 MLJ 543. In that case the appellants who were tour and travel operators (the employer) appointed the respondent (the employee) as their tour representative. Pursuant to an agreement entered into between the employer and the employee (the agreement) the employee undertook to serve the employer for a minimum period of three years in consideration for the on-the-job training given to him. Under art. VI of the agreement the employee further agreed to pay RM20,000 as agreed compensation to the employer if he failed to fulfil his obligation in the agreement. The employee tendered his resignation after having served only 2 years and 2½ months, and the employer sued him for the liquidated sum of RM20,000. The employer succeeded in its claim in the Sessions Court. On appeal, the High Court, reversed the decision on the grounds that (1) the

RM20,000 claimed, being a penalty, was unenforceable and (2) it was incumbent upon the employer to prove the actual damages incurred by them for providing the on-the-job training for the employee. Dismissing the appeal of the employer Siti Norma Yaakob JCA said at p. 547:

> ... In this case, the nature of the loss suffered by the appellants is inter alia the expenses incurred by them for providing on-the-job training for the respondent. They should not have any difficulty in proving that loss if they had kept an account of the total expenses incurred for such training. The learned judge however found that no such proof was forthcoming from the appellants as they were content to rely on the amount stipulated in the agreement as their measure of damages without proving actual loss. We found no reason to disturb the finding of the learned judge, and we had accordingly dismissed the appeal with costs and ordered the deposit be paid to the respondent to account of his taxed costs.

In another very recent case the Federal Court again adopted the principle behind *Selva Kumar*. In *Realvest Properties Sdn. Bhd. v. Co-operative Central Bank Ltd (In receivership)* [1996] 2 MLJ 461, the respondent was a co-operative society registered under the Co-operative Societies Act 1948 (the co-operative society). In consideration of a loan of RM3 million to a member of the co-operative society (the borrower) the appellant (the chargor) charged a piece of land in favour of the co-operative society as security. It was common ground that the loan was to be utilised by a company KPSB. The provisions for default interest were annexed to the instrument of charge. Pursuant to cl. 3.1 of the annexure, interest on the loan was prescribed at the rate of 14.5% per annum on monthly rests (the prescribed rate). However, cl. 3.2 further provided that in the event that any amount due, whether of principal or interest, was not received by the co-operative society on the due date 'the chargor shall pay interest at the rate of 1a times the normal ruling rate of interest on the sum in arrears calculated retrospectively from the due date of such default until the date of the payment of the amount thereof' (the additional interest). The Federal Court *inter alia* decided, that cl. 3.2 of the annexure to the charge in question was void and unenforceable by virtue of s. 75 of the Contracts Act 1950 and that therefore interest calculated by virtue of cl. 3.2 was irrecoverable; Peh Swee Chin FCJ said at p. 472:

> The next question is whether in such event the chargee is entitled to receive a 'reasonable compensation not exceeding ... the penalty stipulated for' according to the said s. 75 which has been judicially interpreted in *Selva Kumar*. We know that there is an established measure of damages payable by a borrower in such default, which is damages for loss of use of fund or money. Such money in the instant case is the sum of money (comprising principal including capitalized principal and interest not yet capitalized) which was in arrear as to

> evoke (futilely, in the instant case) cl 3.2 for charging default interest. Such sum in arrear, if it had not been in arrear and had been paid back punctually to the chargee could have been lent to some other person by the chargee – at certain rate of interest for the period while it was in arrear.
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> Damages for the loss of use of such money has not been proved in this case, so that the court cannot make any award in regard to it following the case of *Kumar*.

In the case before me the claim of the plaintiff is that the defendant failed to get the promised extension of 20 years in the lease. Surely such loss can easily be proved by either calling a real estate valuer to assess the value of a 40-year and a 60-year lease and to ask for the difference. This was clearly not done and the plaintiff had failed to prove its case in the 'usual ways'.

All that the plaintiff did was to make an *ipse dixit* statement of the claim in Court and by that statement simpliciter urged the Court to enter judgment on its behalf. At this juncture it is not inappropriate for me to refer to the judgment of Lord Goddard in the case of *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177 at 188 wherein his Lordship said:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it.

I had no hesitation in dismissing this action and awarded costs on the subordinate Court scale. However my attention has since been drawn to Practice Direction No. 4 of 1994 by my Deputy Registrar which states that all cases filed before 24 June 1994 ought to be heard and concluded in the High Court where it is filed. In the circumstances, costs ought to be awarded on the High Court scale.

Reported by Mariette Peters-Goh